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*   **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+   **ITA No. 519/2010**

Reserved on: 11th November 2017
Decided on: 7th December, 2017

COMMISSIONER OF INCOME TAX, DELHI ....Appellant
Through: Mr. Ruchir Bhatia, Senior Standing Counsel, Mr. Puneet Rai, Junior Standing Counsel and Mr. Gaurav Kheterpal, Advocate.

versus

MARUTI SUZUKI INDIA LTD ..... Respondent
Through : Mr. S. Ganesh, Senior Advocate with Ms. Kavita Jha, Mr. S. Sukumaran, Mr. Anand Sukumar, Mr. Bhuwan Dhoopar, Ms. Roopali Gupta and Mr.Bhupesh Pathak, Advocates.

CORAM: JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

JUDGMENT
% **07.12.2017**

Dr. S. Muralidhar, J.:

1. This is an appeal by the Revenue against the impugned order dated 29th May 2009 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No.300/Del/2006 for the AY 2001-02.

2. This Court framed the following questions of law by its order dated 26th May 2010:

1. Whether the Tribunal is right in holding that Rs.24,92,33,446/- on account of duty drawback had not accrued and become

payable to the assessee and cannot be included in the Taxable income of the assessee for the Assessment Year 1999-2000?

2. Whether learned ITAT/CIT(A) erred in deleting the addition of Rs.l,48,86,451/- on account of Customs Duty on closing inventory with vendors?

3. Whether Tribunal is right in holding that the Assessing Officer was not justified in making addition of Rs.33,39,91,012/- on account of excessive consumption of raw material and inputs?

4. Whether learned ITAT/CIT(A) was justified in allowing MODVAT on input difference at Rs.46,00,00,000/- on account of excessive unexplained consumption of material and when payment partakes the character of penalty?

5. Whether learned ITAT/CIT(A) was justified in allowing claim of Rs.36,09,047/- out of Rs.75,19,975/- on account of depreciation on enhanced liability when the liability arises when assessee agrees to pay the duty?

6. Whether learned ITAT/CIT(A) was justified in allowing disallowance under Section 40 (a) (i) at Rs.4,19,09,113/- in view of the decision of the case of *Chemloor Drug Ltd. v. CIT : 70 TTJ 936*?

3. In view of the decision of this Court today in ITA No.250 of 2005, Question 1 is answered in the affirmative, i.e. in favour of the Assessee and against the Revenue.

4. In view of the decision of this Court today in ITA No.250 of 2005, Question 2 is answered in the negative, i.e. in favour of the Assessee and against the Revenue.

5. In the light of the decision of this Court today in ITA No.31 of 2005,

Question 3 is answered in the affirmative, i.e. in favour of the Assessee and against the Revenue.

6. In view of the decision of this Court today in ITA No.31 of 2005, Question 4 is answered in the affirmative, i.e. in favour of the Assessee and against the Revenue.

7. In view of the decision of this Court today in ITA No.250 of 2005, Question 5 is answered in the affirmative, i.e. favour of the Assessee and against the Revenue.

8. Question 6 concerns payments made by the Assessee to agents based and operating abroad and who earn no assessable income in India. The Assessee contends that no TDS is deductible on such payments under section 195 (1) of the Act and, therefore, the AO was not right in disallowing such payment as deduction by invoking Section 40 (a) (i) of the Act.

9. The Assessee relies on the decisions in ***CIT v. EON Technology (P.) Ltd. [2012] 343 ITR 366 (Del)***; ***CIT v. Model Exims Kanpur [2013] 358 ITR 72 (All)*** and ***CIT v. Gujarat Reclaim & Rubber Products Ltd. [2016] 383 ITR 236 (Bom)*** and on the CBDT Circular No.786 dated 7th February 2000 which clarifies that where the non-resident agent operates outside the country, no part of his income arises in India. It is further contended that since the payment is usually remitted directly abroad it cannot be held to have been received by or on behalf of the agent in India.

10. The Revenue, however, contends that no application was made by the

assessee under Section 195 (2) of the Act for making deduction of TDS at nil rate or lower rate. Remittance of the amount to the agents abroad without such certificate would, according to the Revenue, attract Section 40 (a) (i) of the Act. It is accordingly contended by the Revenue that the AO was right in disallowing deduction of the aforementioned payments made abroad.

11. The contention of the Revenue, invoking Section 195 (1) of the Act, proceeds on the premise that the amount paid to the agents abroad were in fact 'chargeable' to tax in India. Factually it would have to be shown that the said sum was received in India. Here there is also no factual determination that the non-resident agent who operates outside India has any income which arises in India. Without these foundational facts, the question of applying Section 195 (1) of the Act does not arise.

12. In ***CIT v. Model Exims Kanpur*** (*supra*), it was held that there was no obligation to deduct TDS under Section 195 of the Act from the commission paid to a non-resident recipient who was not liable to tax in India. In ***CIT v. Gujarat Reclaim & Rubber Products Ltd.*** (*supra*), the commission earned by a non-resident agent who was in the business of selling Indian goods abroad, was held not to be income that had accrued and/or arisen in India. Therefore, Section 40 (a) (i) of the Act could not be invoked to disallow such payment as deduction on the ground that no TDS under Section 195 (1) was deducted from such payment. Further the CBDT Circular No. 23 dated 23rd July 1969 stated that "A foreign agent of an Indian exporter operates in his own country and no part of his income arises in India." It acknowledges that such commission is remitted to the agent abroad and "not received by

him or on his behalf in India. Such agent is not liable to income-tax in India on the commission." This was reiterated by the subsequent Circular No 786 dated 7th February 2000. Both the circulars are binding on the Revenue.

13. The contention of the Revenue that the above Circulars cannot override the Act, was negatived by this Court in ***CIT v. EON Technology (P.) Ltd.*** (*supra*), by holding that when a non-resident operates outside the country, no part of his income arises in India. Further it was held that merely because an entry is made in the books of accounts does not mean that the non-resident received any payment in India. Since no part of the income could be deemed to have accrued to the non-resident in India, there was no obligation to deduct TDS from the payment made to such non-resident. Consequently, the question of disallowing the payment under Section 40 (a) (i) of the Act for failure to deduct TDS did not arise.

14. Question 6 is accordingly answered in the affirmative, i.e. favour of the Assessee and against the Revenue.

15. ITA No. 519 of 2010 is dismissed.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

DECEMBER 07, 2017
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